

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

SKYWORKS, INC.,

Plaintiff,

vs.

Case No. 2006-1969-NO

SHELBY TOWNSHIP and  
CITY OF FRASER, jointly and severally,

Defendants.

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OPINION AND ORDER

Plaintiff has filed a motion for preliminary injunction, along with a verified complaint for injunctive relief. Defendants Shelby Township ("Shelby Township") and the City of Fraser ("City of Fraser") request the Court deny Plaintiff's motion.<sup>1</sup>

Plaintiff is in the business of selling legal fireworks from temporary outdoor tents at locations throughout the area. Plaintiff's employee, Amy Guzzardo, was responsible for obtaining the necessary permits from Defendants for several years. In 2004, Shelby Township denied Amy Guzzardo's application for a permit to sell fireworks at three tent locations in Shelby Township. Amy Guzzardo filed suit against Shelby Township requesting injunctive relief and superintending control. On June 25, 2004, the Honorable Deborah A. Servitto entered an *Opinion and Order* granting superintending control and ordered Shelby Township to issue the requested permits. In 2005, Amy Guzzardo attempted to obtain the necessary permits from Defendants, and was denied an application based upon ordinances that banned the sale of

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<sup>1</sup> The Court will refer to Shelby Township and the City of Fraser collectively as "Defendants".



fireworks from temporary facilities. On April 6, 2006, Plaintiff attempted to obtain a permit for the sale of legal fireworks from Shelby Township, but was again denied an application to submit for approval or denial. Similarly, in the City of Fraser, Plaintiff, through Amy Guzzardo, had operated three outdoor tents for the sale of legal fireworks prior to 2005, but was refused an application for a permit based upon a similar ordinance prohibiting the sale of fireworks from temporary structures. In 2006, the City of Fraser again refused to provide Plaintiff with an application for a permit for outdoor firework sales.

Plaintiff contends that a preliminary injunction should be entered requiring Defendants to issue applications and permits to Plaintiff for the outdoor sales of restricted fireworks allowed under MCL 750.243a. Plaintiff contends that Defendants' failure to provide an application for a permit deprives its right to access the government and petition for redress under the First Amendment, and Article I Section 1 of the Michigan Constitution. Plaintiff also contends that Defendants ordinances are unconstitutional as they deny its right to engage in a legal business, in violation of the Michigan Constitution, Article I, Section 11. Plaintiff further contends that Defendants ordinances violate the due process and equal protection clauses of the Michigan Constitution contained in Article I, Section 17 and 23 respectively. Plaintiff finally contends that the ordinances violate Article I, Sections 17 and 23, as they are arbitrary and unrelated to public health and safety.

Defendants respond by arguing that Plaintiff has failed to set forth a factual basis to support the allegation that their ordinances are not related to promote the public health, safety and welfare. Defendants also contend that Plaintiff has not set forth any factual allegations of irreparable harm, that the potential harm to the public if a preliminary injunction is issued

outweighs the harm to Plaintiff if the injunction is denied, and Plaintiff has an adequate remedy at law.<sup>2</sup>

A preliminary injunction is governed by MCR 3.310. The granting of injunctive relief is within the sound discretion of the trial court, although the decision must not be arbitrary and must be based on the facts of the particular case. *Roy v Chevrolet Motor Car Co*, 262 Mich 663, 668; 247 NW 774 (1933). The party seeking a preliminary injunction has the burden of establishing that it should be issued. MCR 3.310(A)(4). In determining whether to issue a preliminary injunction, the court must consider four factors: (1) harm to the public interest if an injunction issues, (2) whether harm to the applicant in the absence of temporary relief outweighs the harm to the opposing party if relief is granted, (3) the strength of the applicant's demonstration that the applicant is likely to prevail on the merits, and (4) demonstration that the applicant will suffer irreparable injury if the relief is not granted. *Michigan State Employees Association v Department of Mental Health*, 421 Mich 152, 157-158; 365 NW2d 93 (1984). The Court will address each factor in turn separately.

The first factor is the harm to the public interest if an injunction issues. Defendants have combined this factor with the second factor; whether the harm to the Plaintiff if an injunction is not issued outweighs the harm to the public if an injunction is issued. Defendants contend that the harm to the public is substantial considering the potential fire hazards to the community. Defendant has failed to provide any evidentiary support for this assertion. Plaintiff, however, has provided the Court with the National Fire Protection Association (NFPA) Standard 1124,

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<sup>2</sup> Although Shelby Township and the City of Fraser's ordinances prohibiting the sale of legal fireworks from temporary facilities are somewhat different, the Court will analyze them together since they have the same effect of allowing the sale of fireworks from permanent structures with a fire suppression system sufficient to suppress a fire, while banning temporary roadside stands in their entirety. Both ordinances state: "[t]he permanent building or permanent structure within which fireworks are to be sold shall be in compliance with all applicable fire safety provisions of the fire code most recently adopted by the [Township/City] and shall be fire suppressed with an

Code for the Manufacture, Transportation, Storage and Retail Sales of Fireworks and Pyrotechnic Articles, 2006 Edition. The NFPA Code indicates that no regulation is needed in temporary facilities where the consumer fireworks are in packages or where the total quantity of consumer fireworks on hand does not exceed 125 lb (net) of pyrotechnic composition. (Section 7.3.1.1). The NFPA Code sets forth minimum separation distances relating to the size of the tents or stands, vehicle parking, storage, means of egress, and corresponding fire suppression systems required. The Court finds that if these standards are adhered to, the public would be adequately protected from any potential dangers associated with fires. Plaintiff has also set forth sufficient factual assertions in its verified complaint to demonstrate that it would be injured by not being able to pursue a legal business. Consequently, the Court is satisfied that the Plaintiff's potential injuries outweigh the potential danger to the public.

The Court will next address the likelihood of Plaintiff prevailing on the merits. Municipalities may enact rules and regulations concerning the retail sale and storage of fireworks that are not unreasonable or inconsistent with regulations established by state law. *City of Detroit v Qualls*, 434 Mich 340, 363; 454 NW2d 374 (1990). However, it is axiomatic that ordinances must be constitutional in order to be valid. Ordinances are not subject to judicial intervention absent abuse of discretion, excessive use of power, or error of law. *Square Lake Hills Condominium Ass'n v Bloomfield Township*, 437 Mich 310, 317; 471 NW2d 321 (1991). The test for determining whether an ordinance is reasonable requires us to assess the existence of a rational relationship between the exercise of police power and the public health, safety, morals, or general welfare in a particular manner in a given case. *Id.*, at 318. It is well established in

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automatic sprinkler system sufficient to suppress a fire in or near the fireworks being sold, as determined by the [Township/City's] Fire Marshall."

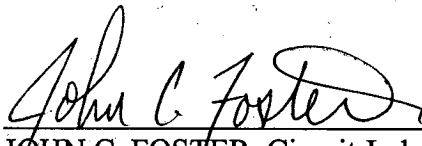
Michigan that ordinances are presumed valid and the burden is on the person challenging the ordinance to rebut the presumption. *Qualls*, supra, at 364.

In the case at hand, as mentioned above, Plaintiff has provided the Court with the NFPA Code setting forth the standards for temporary fireworks sales displays, and the appropriate fire suppression system for the size of the facility and the amount and type of fireworks stored. Defendants have only provided the Court with an assertion that an all out ban on temporary facilities protects the public safety. Although the ordinances are presumed valid, the Court is satisfied that Plaintiff is likely to prevail on this issue. The evidence provided demonstrates that the appropriate regulations are sufficient to protect the public, and that Defendants' outright ban on outdoor fireworks sales may not be rationally related to promote the ends of public safety. The Court is also satisfied that the City of Fraser's argument that their ordinance will reduce theft and protect from uncontrolled weather conditions is unpersuasive as being rationally related to promote public safety. Consequently, the Court is satisfied that Plaintiff is sufficiently likely to prevail on the merits.<sup>3</sup>

The Court will next address whether Plaintiff will be irreparably harmed if a preliminary injunction is not issued. Irreparable harm requires damage that can not be remedied at law. *Acorn Bldg Components, Inc v UAW Local 2194*, 164 Mich App 358, 366; 416 NW2d 442 (1987). In the case at hand, the Court is satisfied that Plaintiff's damages would be difficult, if not impossible to calculate since there is no way to determine the amount of fireworks that would be sold, and therefore potential profits made from the sales. In addition, it appears that denying Plaintiff the preliminary injunction would prohibit Plaintiff from pursuing a legal business. Consequently, Plaintiff has demonstrated irreparable harm, and Plaintiff's motion for preliminary injunctive relief should be granted.

Based upon the reasons set forth above, Plaintiff's motion for preliminary injunctive relief is GRANTED. Defendants are hereby ordered to provide Plaintiff with the necessary permits to operate temporary facilities for the sale of legal Michigan consumer fireworks. The permits may be conditioned upon fire suppression systems as deemed appropriate by Defendants' Fire Marshall in accordance to the standards set forth in the NFPA Code. A hearing on whether this preliminary injunction should become permanent will be heard on July 17, 2006 at 8:30 a.m.. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order does not resolve the last claim and does not close the case.

IT IS SO ORDERED.

  
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JOHN C. FOSTER, Circuit Judge

Dated: June 22, 2006

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<sup>3</sup> Based upon this finding, the Court will not address the remainder of the constitutional issues raised by Plaintiff.